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September 28, 2012

Docket Clerk
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Re: Appeal of the Executive Director's Use Determination regarding Salado at Walnut Creek Partners, LLC Watersbend Apartments; Use Determination Application No. 15502; TCEQ Docket No. 2012-1696-MIS-U.

Dear Clerk:

Attached, please find, the Original plus seven (7) copies of the Brief of Salado at Walnut Creek Partners, LLC Watersbend Apartments in Reply to the Chief Appraiser of Travis Central Appraisal District's, Office of Public Interest Counsel's, and Executive Director's Briefs to Notice of Appeal By Salado At Walnut Creek Partners, LLC Watersbend Apartments.

Please return a file stamped copy of this letter with the courier. Thank you for your assistance in the matter and please do not hesitate to contact me with any questions or concerns.

Sincerely,

Alysa Baker

Alysa S. Baker
Paralegal

Xc: Salado at Walnut Creek Partners; Chief Appraiser; Susana M. Hildebrand, P.E.; Chance Goodin; Robert Martinez; Blas Coy; Kyle Lucas; and Eli Martinez.

TCEQ Docket No. 2012-1696-MIS-U

APPEAL OF THE EXECUTIVE DIRECTOR'S USE DETERMINATION REGARDING SALADO AT WALNUT CREEK PARTNERS, LLC WATERSBEND APARTMENTS USE DETERMINATION, APPLICATION NO. 15502	§	**BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

BRIEF OF SALADO AT WALNUT CREEK PARTNERS, LLC WATERSBEND APARTMENTS IN REPLY TO THE CHIEF APPRAISER OF TRAVIS CENTRAL APPRAISAL DISTRICT'S, OFFICE OF PUBLIC INTEREST COUNSEL'S, AND EXECUTIVE DIRECTOR'S BRIEFS TO NOTICE OF APPEAL BY SALADO AT WALNUT CREEK PARTNERS, LLC WATERSBEND APARTMENTS

TO THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

I. STATEMENT OF FACTS

Salado at Walnut Creek Partners, LLC ("Salado") requests that the Commission reconsider its Negative Use Determination for the first floor units of the apartment complex as not controlling or monitoring for air pollution.

The apartment complex at issue is situated over an abandoned landfill which was previously operated by the City of Austin (1960-1968). In the summer of 1992, methane gas was discovered in the first floor units and consequently, the residents of the entire complex were ordered to evacuate, and the entire complex was closed by State and Municipal authorities. Subsequently, the new owners initiated negotiations with the TCEQ (formerly TNRCC), the Texas Department of Health, Travis County, and the City of Austin to remediate, and rehabilitate the property.

A Comprehensive Assessment/Remediation Plan was developed and implemented through the TCEQ's Voluntary Clean-Up Program (VCP #301) to address the environmental issues related to the abandoned landfill.

In 2007, the then owner, Wells Fargo Bank Minnesota ("Wells Fargo"), applied for and received a Positive Use Determination for the first floor units which was classified as "fugitive emission containment structures, and building for active gas extraction system". The remainder of the real estate (not including the first floor) received a negative use determination (See Exhibit A).

Contrary to the Executive Director's belief, there can be no question that the first floor of the complex had been applied for and granted a Positive Use Determination in 2007. The Site Inspection Form, which is part of the application filed for the 2007 Use Determination contained the following under the heading "Fugitive Emissions Containment Structures":

> "Structure used to contain for monitoring purposes emissions released from decomposing materials. 1st floor level of onsite buildings housed pollution control equipment (Continuous Emissions Monitors) used to detect VOCs. 1st floor levels of onsite building structures." (Exhibit B)

In November of 2010, Wells Fargo sold the complex to Salado who then re-applied for the use determination as required by TCEQ rules. On July 13, 2012 Salado received a Negative Use Determination which stated "the first floors of the buildings do not control, monitor, or prevent air, water, or land pollution" (Exhibit C).

There were no intervening factors or changes in the use of the first floor of the apartments (other than ownership) between the time of the granting of the positive use determination for the

first floor "fugitive emissions containment structures" granted in 2007 and the Negative Use Determination for the first floor in 2012.

II. ARGUMENTS AND AUTHORITY

Contrary to the claim of the TCEQ and Travis County, apartment complexes are not "residential" property for property tax purposes. This issue has been settled by the Texas courts see *Sonterra Capital Partners, Inc. v. Sonterra Property Owners Association, Inc. (216 SW3d 417).* In *Sonterra,* the owner of an apartment complex argued that they were not required to pay assessments to a property owners association which assesses "commercial" property because the apartment complex, according to Sonterra Partner, should be considered "residential". In this regard, the Court states as follows:

> "To support their argument to the contrary, the Owners argue that apartment complexes are not "'commercial,'" which "is commonly defined, in relevant part, to mean 'of or relating to commerce.'" However, "commercial" has several definitions. Another definition of "commercial" is "viewed with regard to profit." MERRIAM-WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 264 (Merriam-Webster, Inc. 1984). The Owners dispute that their primary aim in owning the apartments is profit. But, they argue, their apartments cannot be considered "commercial" because they are used by their occupants as residences."

The *Sonterra* court held that an apartment complex is a commercial building for the purposes of assessments. Just as in *Sonterra* the apartment complex purchased by Salado is only

owned by them for one reason, and that is to make a profit for its investment in the complex. The holding of *Sonterra* defining "commercial" property as that property "viewed with regard to profit" negates the argument of the Executive Director and TCAD that the first floor of the complex should be considered residential, and therefore not eligible to receive a positive use determination. The first floor by definition is commercial property and is eligible for a positive use determination. The first floor, just as the rest of the complex is owned only for the purpose of making a profit.

III.

The TCEQ and the Office of the Public Interest Counsel argue that the first floor apartments are not eligible to receive a positive use determination, as somehow the first floor is used wholly to provide a service. The Executive Director relies upon 30 TAC §17.16 which states in pertinent part as follows:

> "The following are not exempt from taxation and are not entitled to a positive use determination under this chapter: (1) property is not entitled to an exemption from taxation: (A) solely on the basis that the property is used to manufacture or produce a product or provide a service that prevents, monitors, controls, or reduces air, water or land pollution; (B) if the property is used, constructed, acquired or installed wholly to produce a good or provide a service."

The TCEQ cites to *Mont Belvieu Caverns, LLC v. TCEQ (2012 WL 3155763)* as support for the first floor units being a "service". There, however, the pond system which the company claimed to be entirely for pollution control was actually used to provide some storage services to

the company's clients, and was therefore part of the production process. In *Mont Belvieu* the company is in the business of storing natural gas liquid in salt domes. *Mont Belveiu* pumps in brine to displace the gases, and when *Mont Belveiu* needs to pump gases into the cavern, brine must be removed. *Mont Belveiu* constructed large surface impoundments at the storage facilities to retain the displaced brine. The storage facilities were classified by *Mont Belveiu* as pollution control property, but as the court found, and *Mont Belveiu* acknowledged, the brine ponds were part of the process by which the company produces its gas storage services for its customers.

Here, the apartment complex produces no "goods" nor provides any type of "services" as contemplated by *Mont Belvieu.* The court was correct in *Mont Belvieu,* but the facts in that case are not the same as in the case at hand. Consequently, 30 TAC §17.6(1)(B) is not applicable in this matter. Further, providing housing for renters would not be considered a "service" under any interpretation of *Mont Belvieu* or any other common usage of the word. See "Service" Definition "work done or help provided, esp. for the public or for a person or an organization." (*Cambridge Academic Content Dictionary.* Cambridge University Press, 2011.)

IV.

The Chief Appraiser of Travis Central Appraisal District ("TCAD") argues that Salado cannot be granted the tax exemption because the apartment complex was taxable prior to 1994. The Chief Appraiser's argument has no merit as the improvements to the real property "used as a facility, devise, or method for the control of air, water, or land pollution" were all made subsequent to 1994. (See Response Action Completion Report for Watersbend Apartments at Little Walnut Creek on Highway 183, attached as Exhibit D).

Even though the site's Comprehensive Assessment/Remediation Plan (CARP) was not approved until April 19, 1995, the Chief Appraiser still argues that Appellant should be exempt.

Obviously, all real estate has been on someone's tax rolls subsequent to 1994, as all real estate has been subject to taxation prior to 1994. However, this property was not changed to be used as a method to control pollution until after 1994, and therefore Appellant can properly claim a positive use determination for the first floor of the complex. If one were to accept the Chief Appraiser's argument there would never be a piece of property that met the 1994 standard, as all property has been taxed by some entity prior to 1994.

V.

This property/equipment at issue here consists of two components that together provide "The Fugitive Emission Containment/Methane Capture System" and the enclosed space for the fugitive emission monitoring/control system.

The first component, "The Fugitive Containment Structure/Methane Capture System" consists of 22 post-tension inverted concrete boxes that also serve as the first floor slab of the 22 buildings at the site. As depicted in the attached Figures SK-E-2 (Exhibit E) and SK-E-4 (Exhibit F) of Appendix C of the Response Action Completion Report (Exhibit D) for the site, these inverted concrete boxes/slabs function as an emission containment/methane capture system that capture and contain the landfill/methane fugitive emissions which are generated by the decomposition of the putrescible material that exists underneath these structures in the body of the old landfill. These concrete boxes contain the extraction wells that collect the fugitive emission, which are collected in these structures.

The second component, and what is in controversy, is the first floor apartments which are built over the inverted concrete box/slab that provides the enclosed space for the continuous fugitive emission monitoring and detection system.

The concrete slab and the first floor structure act together as the fugitive emission containment/methane capture system in each of the 22 buildings and are a significant and integral part of the site-wide active soil gas extraction system (AGES), without which the site-wide fugitive emission capture, monitoring and control will not function.

VI.

The TCEQ takes the position that somehow the 2007 application was misleading, and therefore the TCEQ should not be bound by the earlier decision made by the agency to grant the first floor a positive use determination. The Executive Director has obviously failed to review the 2007 application which clearly states in the Site Inspection Form as follows:

> "Structure used to contain for monitoring purposes emissions released from decomposing materials. **1st floor level of onsite buildings housed pollution control equipment** (Continuous Emissions Monitors) used to detect VOCs. 1st floor levels of onsite building structures." (Exhibit B) (emphasis added)

The Executive Director further argues that the 2007 Use Determination can be disregarded as an agency is allowed to treat "similarly situated applications" in a different manner. The Executive Director ignores the fact that while the applicants name has changed, no other factors related to the application under appeal have been altered since the 2007 Use Determination, which granted the first floor a positive use.

VII.

The Executive Director's decision to deny the Use Determination in the first place is astonishing considering the fact that the 2007 Use Determination has been in litigation since

January 2008, as the TCAD refused to abide by the 2007 TCEQ issued Use Determination. See Plaintiff's Original Petition (Exhibit M)

In fact Wells Fargo, the original applicant for the Use Determination, was granted a Summary Judgment (Exhibit G) against the TCAD, and the Appraisal Review Board on June 30, 2008 by the Travis County District Court. This required the Defendants to "apply the pollution control use determination as issued by the Executive Director of the TCEQ on April 10, 2007" (Exhibit H).

TCAD then filed a Motion for New Trial (Exhibit I) on the Motion for Summary Judgment which was denied by the District Court in Travis County on August 13, 2008.

Even with the Motion for New Trial on Wells Fargo's Motion for Summary Judgment being denied by the court, TCAD still refused to apply the Use Determination for the first floor of the apartment complex. Wells Fargo then filed a Motion for Sanctions against TCAD (Exhibit J). On December 10, 2008 the District Court in Travis County sanctioned TCAD in the amount of $97,459 plus attorney's fees in the amount of $7,500 (Exhibit K).

Ultimately TCAD appealed the District Court's finding that the first floor was to be treated as a "pollution control property". This appeal was denied by the Third Court of Appeals, Austin Division by Memorandum Opinion on March 19, 2010 (Exhibit L).

The Court of Appeals decision upholding the Motion for Sanctions against TCAD is a well thought out opinion that addresses the issues associated with granting the property a tax exemption for the first floor, which is the issue at hand now. The Court of Appeals opinion states as follows:

> "Wells Fargo owns an apartment complex (the "property"), which was built over a closed municipal solid-waste landfill. After

> taking measures to bring the property into compliance with existing environmental regulations, Wells Fargo filed an application with the TCEQ to have the property declared a "pollution control property," thereby entitling Wells Fargo to apply for a property-tax exemption. *See* Tex.Const. art. VIII, §1-*l;* Tex.Tax Code Ann. §11.31 (West 2008). On its application, Wells Fargo described each of the portions of real estate and property improvements for which it sought exemption. Among the improvements relevant to this appeal, Wells Fargo listed "Fugitive Emissions Containment Structures" as a property improvement to be exempt under its application. Wells Fargo identified these as "[s]tructures used to contain, pollution control equipment (continuous emission monitors) used to detect VOCs"".

The court then addresses the $97,459 Sanctions Order which was issued against TCAD and stated as follows:

> "At the conclusion of the hearing, the trial court ordered that Wells Fargo recover as a sanction the sum of **$97,459, representing the portion of the ad valorem tax assessed on the first-floor units**, which Wells Fargo had paid under protest." (emphasis added)

Clearly, the Court of Appeals was stating in no uncertain terms that it had reviewed all of the arguments made by TCAD, they were found lacking, and the first floor of the apartment complex was to be exempt from the property tax as determined by the 2007 Use Determination.

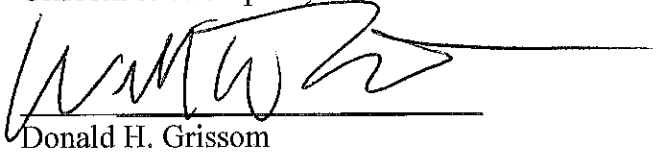
VIII. CONCLUSION AND PRAYER

Salado respectfully requests that its appeal of the July 13, 2012 Negative Use Determination related to the first floor of the buildings be affirmed, and that the Executive Director's Negative Use Determination be in all parts denied. The facts related to the issue at hand have been litigated extensively and every court that has addressed the issue has found that the first floor of the apartment complex should be exempt from property tax. A decision to approve the Executive Director's Negative Use Determination concerning the first floor, after such extensive litigation on the issue, would be deemed arbitrary and capricious.

WHEREFORE, PREMISES CONSIDERED, for these reasons and in the interest of justice and fairness, Appellant, Salado at Walnut Creek Partners, LLC, asks that the appeal of the Executive Director's July 13, 2012 Negative Use Determination be granted.

Respectfully submitted,

Grissom & Thompson, LLP



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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document has been either hand delivered, sent by U.S. Mail, Certified Mail, Return Receipt Requested, and/or Facsimile Transmission to the following service list on this 28 day of September, 2012

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